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No. 00-1853

IN THE
# Supreme Court of the United States

AKOS SWIERKIEWICZ,

*Petitioner,*

v.

SOREMA, N.A.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dated: November 16, 2001

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## MOTION OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") moves this Court pursuant to Supreme Court Rule 37.1(b) for leave to file an *amicus curiae* brief in support of the petitioner in this action. Consent has been sought from both parties for the filing of this brief, and petitioner's counsel has consented. Respondent's counsel has not replied to telephone requests and letters seeking consent for the filing of this brief.

### Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York. It was formed to assist African Americans in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment.

LDF attorneys have had substantial experience in private enforcement of claims arising under Title VII of the Civil Rights Act of 1964. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

WHEREFORE, for the foregoing reasons, LDF prays that this Court will allow the filing of its brief as *amicus curiae* in this action in support of petitioner.

Respectfully submitted,

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## BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

### Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and particularly discrimination in employment. LDF believes that its experience in, and knowledge gained from, such litigation will assist the Court in this case.

### Summary of Argument

The Second Circuit's heightened pleading rule in this case fails to consider the many practical and legal restrictions upon informal pre-complaint discovery in employment discrimination cases. These restrictions include federal and state laws prohibiting a prospective plaintiff's access to personnel files and related records as well as widespread employer practices treating many personnel matters as confidential. These matters include documents providing salary information, performance evaluations, employee resumes, job descriptions, promotion criteria and management guidebooks, among others. These materials would need to be available in order for a plaintiff to satisfy the burden that the Second Circuit has imposed in this case.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

These restrictions also include state ethical rules which, in many jurisdictions, place limits on the ability of a prospective plaintiff's counsel to interview decision-makers and potential witnesses employed by corporate defendants. These ethical rules restrict contacts by plaintiff's counsel (and plaintiffs acting at the direction of their counsel) when an employer is represented by an attorney. Some jurisdictions have interpreted their "no-contact" rules broadly to forbid access to virtually any potential witness in an employment discrimination case.

As a consequence of these restrictions, in many instances employment discrimination plaintiffs and their counsel have little information prior to filing the complaint over and above that sufficient to put the defendant on notice of the claims pursuant to the standards of *Conley v. Gibson*, 355 U.S. 41 (1957) and its progeny. Adoption of the Second Circuit's fact-pleading rule would effectively foreclose recourse to the courts to those plaintiffs who lack access, prior to formal discovery, to the documents that show comparative treatment of other employees, and to the witnesses who were decision-makers or otherwise had knowledge regarding the treatment of comparable employees.



## ARGUMENT

### IN LIGHT OF BARRIERS TO PRE-COMPLAINT DISCOVERY IN EMPLOYMENT DISCRIMINATION CASES, ADOPTION OF THE SECOND CIRCUIT'S FACT-PLEADING RULE WOULD FORECLOSE ACCESS TO THE COURTS FOR REDRESS OF MERITORIOUS CLAIMS

The Second Circuit's decision in this case requires the plaintiff in an employment discrimination case[2] to plead "facts upon which a court could find a violation of the Civil Rights Acts." *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077 at *1 (2d Cir. March 12, 2001) (No. 00-9010). In order to survive a motion to dismiss, the Second Circuit requires that a plaintiff plead facts in support of each of the *McDonnell-Douglas* elements of a *prima facie* case. This pleading requirement includes facts regarding "qualification for the job in question" and "the circumstances giving rise to an inference" of discrimination. *Swierkiewicz*, 2001 WL 246077 at *2.

The Second Circuit's decision ignores the practical difficulties such a test would impose upon plaintiffs and their counsel in employment discrimination cases, and if affirmed, would effectively foreclose the filing of numerous meritorious claims. The Second Circuit failed to recognize that in many instances prior to formal discovery, a plaintiff does not know many of the central facts of the case. This is because these central facts often require comparison of plaintiff's treatment to that of similarly situated members of the non-protected class. *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff' . . .

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[2] The plaintiff in this case alleged both national origin and age discrimination.

[citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)]. In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin."' *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), quoting *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977)").[3]

**A. Before the Filing of an Employment Discrimination Complaint, Employers Have Virtually Exclusive Control Over Information Necessary to Establish the Elements of a *Prima Facie* Case**

At the outset of an employment discrimination case, the employer has essentially exclusive control over all of the relevant information required to establish the elements of a *prima facie* case. As one district court recently observed:

> [U]nlike plaintiffs outside the employment context, all the relevant action takes place in a setting controlled by the employer. While other plaintiffs can conduct an informal investigation to shape their theories — for example, interview the witnesses to the accident, talk to the participants, determine the strategy out of earshot of his opponents — this Plaintiff must stand at the employer's door and seek permission to enter.

*Kaveney v. Murphy*, 97 F. Supp. 2d 88, 89 (D. Mass. 2000); *see also Frey v. Department of Health & Human Serv.*, 106 F.R.D.

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[3] Even "qualifications for the job in question" may not be known prior to discovery, as qualification is often a relative concept, requiring information regarding an employer's own interpretation or application of its job requirements. *See, e.g., Ford v. Veterinary Centers of America, Inc.*, 2001 U.S. Dist. LEXIS 15914, at *11 (E.D. Pa. September 13, 2001) (No. 00-4604) (while plaintiff acknowledged that she failed to meet 20-25% of the published job qualifications, evidence suggested that the person selected was even less qualified.).



32, 37 (E.D.N.Y. 1985) (discussing "need of the adverse attorney for information which may be in the exclusive possession of the [organization] and may be too expensive or impractical to collect through formal discovery") (*quoting Wright By Wright v. Group Health Hosp.*, 691 P.2d 564, 568 (Wash. 1984)).

In many situations, facts central to plaintiff's claims are contained within the personnel files of the employer — under the employer's control and unavailable to the plaintiff prior to formal discovery. *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (noting that personnel files "could be central to the plaintiffs' effort to prove pretext," and may be in the "exclusive control of the opposing party"); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) (acknowledging that personnel file materials reflecting qualifications and job performance are frequently "at the heart of [the] controversy").

Frequently, information in personnel files is protected by statutory protections of privacy. *See, e.g.*, 5 U.S.C. § 552a(b)(11) (prohibiting the release of federal employee personnel files under Privacy Act without a court order); TEX. GOV'T CODE ANN. § 552.102 (exempting from Texas Open Government Act information in employee's personnel file); *Kobeck v. Nabisco, Inc.*, 166 Ga. App. 652, 653, 305 S.E.2d 183, 185 (1983) (acknowledging "that an employee's personnel file is generally considered confidential").

Employers routinely treat as confidential most personnel documents that are relevant to discrimination claims. For example, many employers treat salary data as confidential, *see Hamilton v. 1st Source Bank*, 895 F.2d 159, 164 (4th Cir.) ("[N]ormal and prudent American business practice is to discourage sharing information about salaries."), *rev'd en banc*, 928 F.2d 86 (4th Cir. 1990), as well as job descriptions, employee profiles, performance criteria and documents

describing the criteria and process for promotion actions. *EEOC v. Morgan Stanley*, 132 F. Supp. 2d 146, 152 (S.D.N.Y. 2000) (describing defendant's opposition to production of such documents).

Employers also frequently treat as confidential disciplinary records, job analyses, and employment tests, *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 889 (E.D. Wis. 1999) ("To date, the City has refused to produce the testing documents, the promotion documents or any of the IAD [Internal Affairs Department] documents.") as well as manuals describing an employer's human resources practices. *Herrera v. Mobil Oil Co.*, 1990 U.S. Dist. LEXIS 11082, at *5-*6 (W.D. Tex. August 17, 1990) ("Management Guides" regarding career development, salary administration, job descriptions and equal employment opportunity were treated by the company as confidential). Similarly, documents concerning prior complaints of discrimination by other minority employees are frequently treated as confidential. *EEOC v. Morgan Stanley*, 132 F. Supp. 2d at 149-50 (noting employer's opposition to production of such documents in response to two separate EEOC subpoenas).

Employers do not routinely make confidential materials available prior to litigation — in some instances it is unlawful for an employer to do so. 5 U.S.C. § 552a(b)(11); MD. CODE ANN., STATE GOV'T. §10-616(I) (prohibiting release of personnel records of state employees); MISS. CODE ANN. § 25-1-100 (exempting personnel records of state employees from Public Records Act); N.C. GEN. STAT. § 126-22 (same). In these instances, it is only through the discovery process that plaintiff is able to obtain the relevant facts. *Weahkee v. Norton*, 621 F. 2d at 1082 (noting that FED. R. CIV. P. 37 provides vehicle for obtaining release of personnel files of comparable employees).



On occasion, employers even resist production of such materials in response to EEOC subpoenas issued prior to the start of litigation.[4] *See, e.g., EEOC v. Morgan Stanley*, 132 F. Supp. 2d at 150. In those instances where an employer produces documents to the EEOC, restrictions apply to plaintiff's access to those documents. *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1258-59 (E.D. Wis. 1996) (certain provisions of FOIA "regulate severely the disclosure of information and documentation which the EEOC would receive via this subpoena"); *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 894 (E.D. Wis. 1999) (noting that confidential commercial information, law enforcement materials, testing papers and "promotion documents" were probably unavailable to plaintiff or plaintiff's counsel through a FOIA request filed prior to initiation of Title VII complaint).

As a practical matter, therefore, access to a vast range of documents setting forth facts central to an employment controversy is largely unavailable to employment discrimination plaintiffs and their counsel prior to the filing of the complaint.[5]

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[4] Title VII of the Civil Rights Act of 1964 does not grant to private plaintiffs the subpoena power granted to the EEOC to investigate a claim prior to litigation. 42 U.S.C. § 2000e-9.

[5] Plaintiffs risk losing all rights to recovery under anti-discrimination laws if they pursue informal discovery of confidential documents. *Bonger v. American Water Works*, 789 F. Supp. 1102, 1107 (D. Colo. 1992) (court denied all relief to plaintiff who violated company's confidentiality rules in sharing documents with her counsel in pre-complaint investigation).

## B. Ethics Rules Also Place Limits on Plaintiffs' and Their Counsels' Ability to Obtain Specific Facts in Support of a *Prima Facie* Case Prior to Filing a Complaint

Additional barriers restrict employment discrimination plaintiffs' and their counsels' ability to interview witnesses and decision-makers prior to the filing of the complaint. Persons who have made the challenged decision and witnesses to discriminatory conduct frequently remain in the employ of the company. Such persons are often reluctant to become involved in a lawsuit against their employer for fear of adverse consequences.[6] Further, in some jurisdictions, ethical rules restrict access to these witnesses, thereby making it difficult for employment discrimination plaintiffs and their counsel to obtain sufficient factual information before initiating litigation to do more than put their employers on notice of their claims.

Rules of professional conduct against *ex parte* contacts with the employees of a represented corporation have been interpreted by some courts as prohibiting employment discrimination plaintiffs from approaching non-management level employees to obtain evidence relevant to their claims. *See, e.g., Palmer v. Pioneer Inn Associates, Ltd.*, 19 F. Supp.

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[6] This Court has observed:

> The danger of witness intimidation is particularly acute with respect to current employees — whether rank and file, supervisory, or managerial — over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.

*NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978).



2d 1157, 1168 (D. Nev. 1998) (by communicating with employee "capable of making an admission imputable to [employer]," plaintiff's counsel violated Nevada ethics rule forbidding *ex parte* contacts), *app. pending*, *see* 257 F.3d 999, 1003 (9th Cir. 2001) (certifying to Nevada Supreme Court question whether Nevada applies ethical provision barring *ex parte* contact with an employee "whose statement may constitute an admission on the part of the organization."); *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997) (contact with employer's managerial employee was improper, even though employee did not directly supervise plaintiff); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306, 1321 (N.D. Iowa 1996) (precluding *ex parte* contacts under Iowa law with shipping department supervisor with authority over seven employees); *Insituform of North America, Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622, 625 (S.D. Ohio 1991) (*ex parte* contact with employee whose "admissions are admissible against the employer" prohibited under Ohio law); *Stanford v. President and Fellows of Harvard College*, 2000 Mass. Super. LEXIS 489 (Super. Ct. Mass. Nov. 1, 2000) (lawyers forbidden under Massachusetts law from speaking with any institutional employee, absent consent of institution's counsel, whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization), *app. pending*, No. SJC-08592 (Sup. Jud. Ct. Mass.)[7]; *but see Brown v. Oregon Dep't of Corrections*, 173 F.R.D. 265, 268 (D. Or. 1997) (plaintiff's attorney may, under Oregon ethical rules, interview prison employees who observed instances of hostile work environment without agency

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[7] The trial court imposed sanctions of $94,718.80 in attorney's fees for plaintiff's counsel's pre-litigation investigatory efforts that the trial court found to have violated the Massachusetts contacts rule. *See Stanford v. President and Fellows of Harvard College*, Superior Court Civil Action No. 99-4042 (Super. Ct. Mass. March 21, 2001).

counsel's knowledge or consent); *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903-04 (E.D. Pa. 1995) (permitting *ex parte* contacts, under Pennsylvania ethical rules, with those employees of police department who did not have managerial responsibility).[8] Thus, a requirement that an employment discrimination complaint must plead specific facts showing that at trial a *prima facie* case can be established would not only be contrary to the notice pleading requirements of the Federal Rules of Civil Procedure and this Court's prior decisions,[9] but as a practical matter would — depending on the jurisdiction — not be feasible in light of ethical rules preventing the acquisition of needed evidence.

### C. The Second Circuit's Fact-Pleading Rule Conflicts with or Is Unnecessary in Light of Other Provisions of the Federal Rules of Civil Procedure

Adoption of the Second Circuit's fact-pleading rule also raises issues under Rule 11 of the Federal Rules of Civil Procedure. Rule 11(b)(3) requires counsel to certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." It is virtually impossible for an employment discrimination plaintiff to allege facts with specificity and meet this Rule 11 standard.

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[8] The ethics rules implicated are Rule 4.2 of the ABA Model Rules of Professional Conduct and Disciplinary Rule 7-104 of the ABA Model Code of Professional Responsibility, one or the other of which serves as the basis of each state's "contacts" rules.

[9] *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Conley v. Gibson*, 355 U.S. 41 (1957).



Some courts have ruled that Rule 11 requires more than reliance upon the "uncorroborated word" of the plaintiff and plaintiff's witnesses for "the key contentions of the case." *Gartenbaum v. Beth Israel Medical Center*, 26 F. Supp. 2d 645, 647 (S.D.N.Y. 1998) (*quoting Forbes v. Merrill Lynch, Fenner & Smith, Inc.*, 179 F.R.D. 107, 109 (S.D.N.Y. 1998). *vacated sub nom. Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999)). Again, under the Second Circuit's heightened pleading requirement, this becomes a virtually impossible standard for plaintiff's counsel to meet, particularly in those jurisdictions that impose broad limits on access to witnesses under state ethical rules.

In many instances, there are no sources of information available to plaintiff's counsel prior to filing the complaint other than plaintiff and, depending upon the jurisdiction, perhaps some witnesses. Adoption of the Second Circuit's fact-pleading rule in conjunction with both the barriers to obtaining pre-complaint information described above and Rule 11 standards would make it likely that meritorious claims would not be pursued. Such a result is contrary to the purposes of the Federal Rules of Civil Procedure — "to secure the just, speedy, and inexpensive determination of every action." Rule 1, FED. R. CIV. P. The foreclosure altogether of access to the courts because of a heightened pleading rule is not, of course, a just resolution of a dispute.

Rejection of the Second Circuit's rule does not mean that federal courts must allow non-meritorious claims to go to trial. Rule 56, FED. R. CIV. P. remains the proper vehicle to grant judgment without trial in those instances where there are no genuine issues of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' Fed. Rule Civ. Proc. 56(e)."") (emphasis in original);

*Mullin v. Raytheon Co.*, 164 F.3d 696, 698 (1st Cir. 1999) ("Summary judgment is a device that 'has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways.'"(quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991)).

Nor does rejection of the Second Circuit's rule in this case mean that plaintiffs and their counsel are free to pursue non-meritorious claims once discovery has demonstrated the absence of factual support. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); *Brown v. Federation of State Medical Boards of the United States*, 830 F.2d 1429, 1436 (7th Cir. 1987) (awarding fees under Rule 11 for counsel's pursuit of case after "the record demonstrated that [plaintiff's] claims were not supported by the facts."), *abrogated by Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989).

## CONCLUSION

Significant restrictions, both legal and practical, limit the opportunity of plaintiffs and their counsel to conduct an investigation prior to filing a complaint sufficient to develop the specific facts required to satisfy the Second Circuit's heightened pleading requirements. Adoption of the Second Circuit's rule, in the context of these restrictions, would effectively restrict the ability of plaintiffs with meritorious claims — those dependent upon formal discovery to develop the specific facts in support of a *prima facie* case — to bring their claims at all, thereby effectively denying them recourse to the courts altogether.



Respectfully submitted,

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Dated: November 16, 2001